IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-344

WILLIAM RENFORTH, M.D. ..... Petitioner

-v-

FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., BOARD OF TRUSTEES FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE BOARD OF TRUSTEES OF FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF FAYETTE MEMORIAL HOSPITAL, EARL BRANSON, JOHN D. DARCY, K. DALE FORD, RUSSELL ARCHIBOLD, CHARLES R. BOTTORFF, MARTHA F. KENNEDY, LA VERNE L. MARSH, F. B. MOUNTAIN, J. M. LOCKHART, ALBERT ROBINSON, WILLIS ROSE, HENRY RUHL, KATHLENE SHAVER, DALE SLONEKER, EDWARD THIELKING, WILLIAM THOMAS, R. HIRSCH, R. TAUBE, Z. MUFTI, B. W. SANDERS ..... Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

The Petitioner, William Renforth, M.D., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Indiana, First District,

entered in this matter on December 12, 1978. The Order Denying Petition to Transfer said case (discretionary review) by the Supreme Court of Indiana was entered on June 6, 1979. This Petition, therefore, is filed within ninety (90) days of the denial of the discretionary review.

OPINIONS BELOW

The Judgment of the Union Circuit Court of February 2, 1977, the December 12, 1978, Opinion of the Court of Appeals of Indiana, First District, (of which review is sought), the Order Denying Rehearing of January 16, 1979, and the June 6, 1979, Order Denying Petition to Transfer of the Supreme Court of Indiana, are reprinted in the separate Appendix of this Petition, pages 1-A through 27-A. The Opinion of the Court of Appeals of Indiana, dated December 12, 1978, is reported at 383 N.E. 2d 368. The Orler Denying Petition to Transfer of the Supreme Court of Indiana, dated June 6, 1979, was reported in the Cumulative Rehearing and Transfer Table, — N.E. 2d — (July 11, 1979).

JURISDICTION

The Order Denying Petition to Transfer the within-styled action was entered in the Supreme Court of Indiana on June 6, 1979. The jurisdiction of this honorable Court is inoked pursuant to 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

The following questions are presented for review:

1. Is the provision of health care services to the public generally, to the community, and to the citizens thereof, a public function?

2. If so, does the performance of that public function through and by the operation of a hospital corporation constitute that corporation an agency of the State for the performance of that

public function?

3. If such a hospital corporation, in the course of performing the functions aforesaid, has public officials on its Board of Directors, is the sole hospital facility in its community, is the recipient of public funds, both federal and local, accepts Medicare and Medicaid reimbursements and complies with all Federal laws and regulations provided under the "Conditions of Participation" of Medicare and Medicaid, the National Health Planning and Resources Development Act of 1974, and the Professional Standards Review Organization Amendments to the Social Security Acts, then is action by that hospital corporation action by the State, within the meaning of the Fifth and Fourteenth Amendments?

4. If so — on the record here presented — was due process of law extended to this Petitioner, a duly licensed medical practitioner, in denying him membership on the Hospital Staff.

5. Whether the decision of this Honorable Court in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) can reasonably be applied to the hospital setting given the pervasive influence of the government of the United States in the field of health care, and the fact that the government of the United States has, by legislation and regulation, "insinuated itself into a position of interdependence" with institutional health care providers.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner asserts that, by his exclusion from the Medical Staff of the Respondent, he has been deprived of liberty and property without due process of law, contrary to the following provisions of the Constitution of the United States.

Fifth Amendment to the Constitution of the United Statess

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Section 1, Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I

HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal questions involved were presented, first of all, in the Petitioner's complaint for injunction and for damages which instituted the action in the trial court. Paragraph 1 of the Complaint contained the following allegations:

> 7. That the denial of active staff privileges by the said defendants is an arbitrary denial of the right of the plaintiff to practice his profession and to earn a livng, and

> deprives him of his liberty and property without due process of law; that the plaintiff is a properly qualified physician, of good moral character, anl that there is no legal reason why staff privileges heretofore granted should be denied in an arbitrary cursory fashion without hearing.

(Tr. 66)

Paragraph II contained the following allegations:

> 2. That depriving the plaintiff of membership on the Medical Staff of Fayette Memorial Hospital by the defendants herein is arbitrary and capricious in that a requirement that plaintiff provide proof of coverage of medical malpractice insurance in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) is unreasonable and bears no relationship to medical skill or moral qualifications of the plaintiff to be a member of the Medical Staff of FAYETTE MEMORIAL HOSPITAL.

(Tr. 67)

Paragraph III, after setting forth provisions of the Medical Staff By-Laws respecting the adoption of Amendments thereto (in this case an Amendment making the carrying of malpractice insurance a requirement of membership), alleged:

> 6. That the said Medical Staff did not comply with Article XVI of the By-Laws of the Medical Staff in that the proposed amendment was never referred to a special committee which reported the same at the next regular meeting of the Medical Staff, that said Resolution was not passed by two-thirds (2/3) of the Members of the Medical Staff present at the meeting.

(Tr. 69)

Paragraph IV set forth the By-Law provisions regarding notice and hearing if appointment to the Medical Staff of the Respondent was to be refused, and then alleged:

> 4. That the plaintiff herein was entitled to all of the hearing and appeal procedures provided in ARTICLE VIII of the Medical Staff By-Laws of FAYETTE MEMORIAL HOSPITAL, which includes hearing before an ad hoc committee of the FAYETTE MEMORIAL HOSPITAL MEDICAL STAFF appointed by the Medical Staff, a hearing before FAYETTE MEMORIAL HOSPITAL STAFF EXECUTIVE COMMITTEE, Notice of said hearing, with report and recommendation and hearing before the entire Medical Staff of FAYETTE MEMORIAL HOSPITAL, as provided in Article V of the By-Laws of FAYETTE MEMORIAL HOSPITAL MEDICAL STAFF.

(Tr. 70)

> 5. That no proper Notice was given to plaintiff that he was not being considered for reappointment to the Medical Staff of FAYETTE MEMORIAL HOSPITAL.

(Tr. 70-71)

Paragraph V, after incorporating previous allegations, alleged:

> 4. That the defendants herein have maliciously and wrongfully, and intentionally, prevented the plaintiff herein from practicing his profession by, without cause, and wrongfully, depriving him of membership in the Medical Staff of the Fayette Memorial Hospital, and that the plaintiff is entitled to punitive damages in the total amount herein set out from the defendants herein, individually and collectively.

(Tr. 72)

The allegations of Paragraph I, 7, of the Complaint which are quoted above, were denied, and thus put at issue by the Respondents' Answer to the Complaint. (Transcript Page 147)

Also denied by the Answer were the allegations of Paragraph II, 2; the allegations of Paragraph III, 6; the allegations of Paragraph IV, 4 and 5; and the allegations of Paragraph V, 4 — all of which are set forth hereinabove.

(Transcript Pages 148-149)

By Agreement and Pre-Trial Order (Transcript Page 157), trial briefs were submittel to the trial court.

In the trial briefs filed by the Petitioner his position is stated thus:

> This question is basically a constitutional question under the Fifth and Fourteenth Amendments of the U.S. Constitution.

(Tr. 180)

and again, in conclusion:

> Fayette Memorial Hospital is subject to Fifth Amendment and Fourteenth Amendment control because of its connection with the public interest.

(Tr. 184)

In the trial brief filed by the Respondents their position is stated:

> It is the Defendants' position that Fayette Memorial Hospital is a private hospital; and that its action in terminating Plaintiff's staff privileges was neither arbitrary nor capricious. Thus, if the court finds in favor of Fayette Memorial Hospital on the issue of private versus public status this case should end at that point with a finding in favor of Defendants. A finding to the contrary — that the hospital is public or governmental— would not necessarily mandate a decision for Plaintiff, but it would permit the court to apply different standards in reviewing the hospital's action.

(Tr. 162-163)

Respondents, in this brief, further referred to "the main

issue of whether Fayette Memorial Hospital is a private or public hospital". Respondents further said:

> As Defendants understand it, Plaintiff admits it is organized and operated as a private hospital, but he contends that the hospital should be considered to be public or governmental for purposes of this action. . . .

(Tr. 164)

And they concluded:

> As a private hospital the Fayette Memorial Hospital had the power to adopt the requirement that its staff physicians carry at least $100,000.00 of medical malpractice insurance. This court can not and should not disturb this decision since it is clearly not arbitrary or capricious.

(Tr. 172-173)

The trial court on February 2, 1977, rendered a written judgment or opinion against this Petitioner. In this judgment the Court found that the Defendant (here Respondent) Fayette Memorial Hospital "is a private, not for profit, Indiana Corporation", that its acceptance of public funds "is not sufficient to invoke State action and did not thereby convert defendant hospital into a public or governmental hospital" and that "The Court further finds that Petitioner's due process rights were not violated by any of the defendants". (Tr. 563-654) (Appendix A)

Petitioner, in his Motion to Correct Errors, filed with the trial court on March 31, 1977, and overruled May 19, 1977, from which ruling appeal was taken to the Indiana Court of Appeals, addressed himself to the trial court's decision, as follows:

> This finding of the Court respecting the public or private character of the Defendant hospital a finding which so many well-considered cases reject on similar facts — is

> fundamental to the decision arrived at in this case. It bears directly on the question of procedural due process, which we are about to discuss, and on the Court's finding that "Plaintiff's due process rights were not violated", because if the Defendant hospital is to be treated as public for present purposes, as we submit it should be, then due process requirements of the Fourteenth Amendment apply directly to this problem; a problem which basically involves the right of a qualified physician to practice his profession.

This same Motion asserts that the Hospital's regulations must not be arbitrary or capricious, and that procedural due process must be extended in dismissing a member of the Medical Staff. Petitioner's Brief in the Indiana Court of Appeals stated the issues as follows:

> 1. Is the Fayette Memorial Hospital a "public" institution, in the sense that its actions constitute "state action" and are hence governed by and subject to the "due process" clauses of the 5th and 14th Amendments to the Constitution of the United States?
>
> 2. If the Fayette Memorial Hospital is a "public" institution in the sense stated above, then:
>
> a. The malpractice requirement adopted by the hospital is beyond the "police power" of the State.
>
> b. The malpractice requirement adopted by the hospital is INHERENTLY arbitrary and capricious.

The Brief filed in the Indiana Court of Appeals by the Respondents argued this issue, relying heavily upon the majority opinion of this Court in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345. (1974).

Petitioner's Reply Brief, pages 8-20 thereof, sets forth a detailed argument as to why the *Jackson* rule does not apply or govern here.

The decision and opinion of The Indiana Court of Ap-

peals, 383 N.E. 2d 368, 372-375 (See Appendix to this Petition) discusses and decides the issue of "state action" contrary to the position of this Petitioner. The Court's opinion considers the matter of alleged arbritrary procedure at pages 375-377 of 383 N.E. 2d.

It is thus apparent, Petitioner submits, that the Federal questions presented, and listed hereinabove, were raised in this cause at its inception, and have continued to be raised and urged throughout the course of these proceedings.

II

THE FACTUAL BACKGROUND

The Petitioner, William Renforth, M.D., is a duly licensed physician in the State of Indiana, having been engaged, since 1969, in the practice of medicine at Connersville, Fayette County, Indiana. (Tr. 192-194)

The Fayette Memorial Hospital Association, Inc., a Respondent herein, is a corporation organized and existing under and by virtue of the laws of the State of Indiana, and engaged in operating a hospital at Connersville, Fayette County, Indiana, known as the Fayette Memorial Hospital. (Tr. 647-648). All other Respondents are members of the Board of Trustees, the Executive Committee of the Board of Trustees and the Executive Committee of the Medical Staff of the Fayette Memorial Hospital Association, Inc.

The within controversy arose when the Petitioner, William Renforth, M.D., suffered the termination of his privileges as a member of the Medical Staff of the Respondent hospital on April 1, 1976. It has been understood and agreed, by all concerned, that the Petitioner is a highly competent medical doctor.

The Respondents stipulated that they "do not contend

and have never contended" that Dr. Renforth lacked the requisite medical competence. (Tr. 37). The termination of Petitioner's privileges to practice medicine in the Fayette Memorial Hospital was based solely upon the Petitioner's refusal to comply with an alleged amendment to the By-Laws of the Respondent hospital's medical staff, purportedly enacted on April 22, 1975, requiring the purchase by each staff member of one hundred thousand dollars ($100,000.00) of medical malpractice insurance.[1] (Tr. 479) The dismissal of the Petitioner by the application of the aforementioned By-Law "amendment" was complicated by the fact that said "amendment" was never properly or lawfully enacted. According to Article XVI of the By-Laws of the Medical Staff of the Fayette Memorial Hospital, amendments must be referred to a special committee which shall report on same at the next regular staff meeting called for such purpose. To be adopted, an amendment must receive a two-thirds vote of the active Medical Staff present[2]

---

[1]The minutes of the Medical Staff meeting of April 22, 1975 read as follows:

> A motion was made by Dr. Mazdai and seconded by Dr. Rosen that an addition be made to the Medical Staff By-Laws that every staff member must show evidence of a minimum of $100,000.00 medical malpractice insurance when seeking appointment or continued reappointment to the medical staff of the Fayette Memorial Hospital. (Tr. 479)

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[2]Article XVI of the By-Laws of the Medical Staff of the Fayett Memorial Hospital reads as follows:

> These By-Laws may be amended after submission of the proposed amendment at any regular or special meeting of the Medical Staff. A proposed amendment shall be referred to a special committee which shall report on it at the next regular meeting of the Medical Staff or at a special meeting called for such purpose. To be adopted, an amendment shall require a two-thirds vote of the active Medical Staff present. Amendments so made shall be effective when approved by the Board of Trustees. (Tr. 564)

On April 22, 1975, the date on which the above-purported amendment requiring the purchase of medical malpractice insurance was allegedly adopted, sixteen (16) voting members were present at the meeting. According to the minutes of the Medical Staff, eight (8) members voted in favor of the amendment, four (4) opposed it. (Tr. 5-6, 437, and 479). Simply, eight (8) is not two-thirds of sixteen (16).

On April 1, 1976, the Petitioner was notified by the Executive Committee of the Board of Trustees that he was dismissed. The record reveals that none of the procedural protections were afforded the Petitioner. No written notice of termination of privileges was ever sent to the Petitioner until the day on which he was to leave the hospital, even though the resolution of the Board to dismiss him was adopted on March 18, 1976. The Petitioner was never granted a hearing or any formal appeals since all of the medical staff committees were bypassed. The Board of Trustees, itself, issued the notice of termination. Simply, the Petitioner could never have had a hearing. No one was left to hear his cause, and, there could be no appeals, as the Board was, under the By-Laws, the final arbiter of the question. All of the foregoing is particularly troublesome since the By-Laws of the Respondent hospital provide for the safeguarding of one's due process rights by the establishment of elaborate and technical notice, hearing and appeals procedures. (Tr. 540-544, 550-553)

The Petitioner was never given an opportunity to defend himself. No medical staff committee ever heard his plea, as they were required to do under the By-Laws. Even the most minimum procedural due process standards were avoided.

The Respondent hospital simply decided to rid itself of the Petitioner and be done with it! Since April, 1976, the Petitioner has suffered the destruction of his business, the ruination of his reputation, and the serious financial loss ac-

companying same. There exists no other hospital in which the Petitioner may apply for privileges, as the Respondent institution serves Petitioner's home town and the surrounding counties of Union and Franklin.

What raises the foregoing facts to federal constitutional dimensions is the vast "interdependence" of the governments of the United States and State of Indiana in the administration of the Respondent hospital. It was stipulated that the Respondent, Fayette Memorial Hospital, received six hundred five thousand dollars ($605,000.00) from the United States Department of Health, Education and Welfare under the Hill-Burton program (42 U.S.C. Section 291 *et seq.*) in 1965. A 1967 audit revealed that the Respondent hospital received twenty-four thousand dollars ($24,000.00) in tax funds from the city of Connersville, Indiana, and Fayette County, Indiana, issued five hundred thirty-eight thousand dollars ($538,000.00) in bonds, all for construction for the Fayette Memorial Hospital. Since 1962, a tax levy has been in effect in Fayette County, Indiana, for the purpose of financing the hospital aid bonds issued by the County. (Tr. 24, 28, 30, 43-45, 46, 48) The bond issue was originally in the principal amount of five hundred fifty thousand dollars ($550,000.00), and was known as the Fayette Memorial Hospital Aid Bond Redemption Fund. *Id.*

During the years 1959, 1960, 1961 and 1962, the County Commissioners of Fayette County, Indiana, made monthly payments or donations of tax monies to the Respondent hospital, ranging from one thousand forty-one dollars and sixty-six cents ($1,041.66) to two thousand six hundred sixty-six dollars and seventy-four cents ($2,666.74) per month. (Tr. 51-59, 60-61)

It was stipulated by the parties hereto that three members of the Respondent hospital's Board of Trustees are

elected by City and County officials of Connersville and Fayette County, Indiana. (Tr. 648-49) These three members are elected by the County Council and the County Commissioners of Fayette County, and the Common Council of the City of Connersville. (Tr. 585)

While the Fayette Memorial Hospital is organized under the Indiana Not-for-Profit Corporation Act, I. C. 23-7-1.1-1 *et seq.*, the hospital is eligible for public assistance under I. C. 19-9-5-1 and I. C. 16-12-18-1, and has received same. The corporate structure of the Respondent is replete with evidence of "intent" to operate as a "public" institution. Paragraph (6) (f) of the Article of Reorganization mandates participation by public officials or publicly elected persons on the Board of Trustees. Such persons must be on the board if the institution is to be capable of receiving county and city funds. I. C. 16-21-18-1. The Articles of Reorganization require, as mandated by statute, all trustees to be "non-sectarian" and "non-political". I. C. 19-9-5-3. Compliance is required for any funding.

The State of Indiana, once county and city funds are used, imposes its own terms for the utilization of the hospital. Under I. C. 19-9-5-4, the Fayette Memorial Hospital is required to be "open to all persons on reasonable terms, and [is required to] be open to all poor and indigent persons on reasonable rate to be paid by the proper officers having charge of the care of such poor and indigent persons."

Significantly, the citizens of Fayette County and the City of Connersville, Indiana, regard the Respondent hospital as a public institution and an arm of local government. (Tr. 48, 48, 669-70, 673-675)

Beyond local governmental involvement, the government of the United States has dramatically assumed authority over the administration and decision-making of health care insti-

tutions. The Fayette Memorial Hospital is no exception. Indeed, the Respondent hospital has received six hundred five thousand dollars ($605,000.00) under the Hill-Burton program. Pursuant to Hill-Burton, 42 U.S.C. Sections 291c(e), the Respondent hospital was required to be "available to all persons residing in [its] territorial area . . .", and be made "available . . . to persons unable to pay [for health care services]".

In 1974, Congress extended the Hill-Burton program in an effort to reach deep into the administration of health care facilities. As a result of Congress' efforts, the National Health Planning and Resources Development Act of 1974, 42 U.S.C. Sections 300k *et seq.*, was enacted. Under the Act, "equal access to quality health care at reasonable cost" was declared a "priority of the federal government." 42 U.S.C. Section 300k(a)(1). In addition, Congress asserted that a "comprehensive, rational approach" was required to correct the "lack of uniformly effective methods of delivering health care, the maldistribution of health care facilities and manpower, and the increasing cost of health care." 42 U.S.C. Section 300k (a)(3)(A), (B) and (C). The Act established a system for the development of a "national health planning policy." 42 U.S.C. Section 300k (b).

For the States to receive any funds under Hill-Burton (42 U.S.C. Sections 291 *et seq.*), the Community Mental Health Centers Act (42 U.S.C. Sections 2681 *et seq.*), or the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. Sections 4551 *et seq.*), participation in the National Health Planning Act is required.

The National Health Planning Act established "Health Systems Agencies" (42 U.S.C. Section 300l), which have the "primary responsibility" of providing "effective health plan-

ning for its health area, and the promotion of the development within the area of health services, manpower, and facilities which meet identified needs; reduce documented inefficiencies, and implements the health plans of the agency." 42 U.S.C. Section 300l-2(a).

National guidelines are established, and each H.S.A. prepares a "Health System Plan", the same which is carried out by means of an "Annual Implementation Plan". 42 U.S.C. Section 300l-2(b) (2) and (3). The Act, in addition, established "State Health Planning and Development Agencies" through 42 U.S.C. Section 300m. Such agencies are empowered to administer the "certificate of need" program under which "health facilities may not be built, expanded or modernized without a certificate; approve all contracts and grants for the planning for the development of health resources on the basis of approved priorities; and review all institutional health services in the state." 42 U.S.C. Section 300m-2 (a) Such agencies possess sufficient authority to determine whether a "private" facility should be "modernized" or "converted to new uses". 42 U.S.C. Section 300o-2 (a) (4) (C).

According to the testimony in the instant case, the Respondent hospital receives approximately sixty-thousand dollars ($60,000.00) per month in payments from Medicare (42 U.S.C. Sections 1395 *et seq.*) and Medicail (42 U.S.C. Sections 1396 *et seq.*). (Tr. 638.)

In order to receive payments from Medicare or Medicaid, each hospital must be a "participating" provider, and thereby must comply with the "conditions of participation" set forth in 42 C.F.R. Sections 405.1011 *et seq.* Such "conditions of participation" govern the most minute and technical aspects of hospital administration. They regulate the formulation of By-Laws (42 C.F.R. Section 405.1021), the duties of the hospital administrator (42 C.F.R. 405.1021(g)) capital expenditure plan (42 C.F.R. Section 405.1021 (j) (2)); the construction, maintenance and arrangement of the physical plant (42 C.F.R. Section 405.1022); the formulation, standards, responsibilities, and governing of the Medical Staff (42 C.F.R. Section 405.1023), the formulation and standards of the nursing department (42 C.F.R. Section 405.1025), the maintenance of the medical record department (42 C.F.R. Section 405.1026); the maintenance of the pharmacy department (42 C.F.R. Section 405.1027) the laboratories (42 C.F.R. Section 405.1028) the radiology department (42 C.F.R. Section 405.1029) complementary departments (42 C.F.R. Section 405.1031) outpatient department (42 C.F.R. Section 405.1032) social work department (42 C.F.R. Section 405.1034) utilization review plan (42 C.F.R. Section 405.1035) and many others.

The Fayette Memorial Hospital is governed by the "conditions of participation", and, further, is governed by the professional standards review organization amendments to said Social Security Acts, 42 U.S.C. Sections 1320c *et seq.* P.S.R.O is the federally-mandated review mechanism, charged with the responsibility to (1) precertify hospital services; (2) review, on a sample basis, by diagnosis or condition; (3) review and develop patient and provider profiles; (4) monitor Social Security Administration certification requirements; (5) educate physicians; and (6) report violations and any discipline. The P.S.R.O. in each hospital is, thus, a "cost control" device as well as a form of "non-price rationing, limiting the use of scarce medical resources . . ." Decker & Bonner, *PSRO: Organization for Regional Peer Review* (Cambridge, 1973) 6-7.

As a substantial recipient of Medicare and Medicaid payments, the Respondent, Fayette Memorial Hospital, must comply with the provisions of the PSRO amendments. The By-Laws of the Respondent reveal that it has instituted

"utilization review", the forerunner of Professional Standards Review, established under the Medicare Act, 42 U.S.C. Section 1395x(k) and the "conditions of participation", 42 C.F.R. Section 405.1035. (Tr. 561)

The Fayette Memorial Hospital, as all hospitals in the nation, simply can not be realistically termed "private". Its financial resources are almost totally dependent upon government. Its internal organization and administration are dictated by government. Its medical staff is organized by government. Health care services are monitored, reviewed, rationed and certified by government. The institution's budget and financial outlays are dictated by government. Any expansion of beds, equipment, or physical plant is regulated by government.

REASONS FOR GRANTING THE WRIT

1. This Court has never determined whether the provision of health care services to the public generally is a public function, or whether the rule and rationale of *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) is properly applicable to the performance of that function.

2. The issue presented is important to the medical profession, to the providers of public health care, and to the general public; and it is one as to which State Appellate Courts, and United States Courts of Appeal, are divided in opinion.

3. This cause presents a vehicle whereby the doctrine of "state action", as applied to the provision of public health care services, can be authoritatively delimited and defined.

This is a case where a physician, duly licensed by the State of Indiana, to practice his profession in that state, and

against whom no charges of professional incompetence have ever been made, has been denied the right to practice his profession as a member of the Medical Staff of the Respondent hospital, on the sole ground that he has refused to purchase malpractice insurance, as required by an amendment to By-Laws purportedly enacted by the Medical Staff, and thereafter adopted and approved by the Hospital's Board of Trustees.

Such a requirement is clearly a serious infringement upon personal liberty and freedom of choice; and it is one which could, in practice and in practical effect, take from the licensing State, and deliver into the hands of private insurance companies, the power to determine who shall engage in the professional practice of medicine.

Before such a thing is done, the affected physician ought to be accorded Constitutional due process of law.

It is the position of this Petitioner that, today, the provision of health care services to the general public is, indeed, a public function; that a hospital corporation, organized, regulated, and funded as is the Respondent Fayette Memorial Hospital, becomes, in performing this public function, an agency of the State; and, consequently, that, in the course of performing that function, including the adoption and enforcement of rules and regulations governing membership in its professional staff, that corporation is bound by and must follow procedures consistent with the requirements of due process of law, as laid down and defined by the Fifth and Fourteenth Amendments to the Constitution of the United States.

I

GOVERNMENT, STATE AND FEDERAL, IS A JOINT PARTICIPANT WITH THE RESPONDENT HOSPITAL SO AS TO INVOKE THE PROSCRIP-

TIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The record in the instant case is replete with evidence of government financial support and government regulation of the Respondent hospital. The figures need not be restated here, however, it is important that the purposes of the governmental programs be emphasized. The Respondent hospital has complied with the provisions of the Hill-Burton Act, 42 U.S.C. Sections 291, *et seq.*; the Medicare Act, 42 U.S.C. Sections 1395 *et seq.*; the Medicaid Act, 42 U.S.C. Section 1396 *et seq.*; the "conditions of participation" under Medicare and Medicaid, 42 C.F.R. Sections 405.1011 *et seq.*; the National Health Planning and Resources Development Act, 42 U.S.C. Section 300k *et seq.*; and the Social Security Amendments of 1972 (establishing PSRO's), 42 U.S.C. Sections 1320c *et seq.*

Each of the foregoing federal statutes affect the most minute administrative decision-making processes in hospital management. The financial resources of the hospital are, largely, from government sources. In fact, seventy-four per cent (74%) of the Respondent's construction cost were paid for by some form of government money, largely Hill-Burton resources. The internal organization of the Respondent institution is totally dependent upon government regulation. The Medical Staff, nursing department, pharmacy and laboratories are organized and regulated by government. All health care services are monitored, reviewed, rationed, certified and recertified by government. Hospital costs are, for the most part, controlled by government agencies. The institution's financial outlays and budget are developed according to government guidelines. Any expansion of beds, equipment or physical plant is regulated by government. In fact, government can, if it so desires, convert the Respondent to other

uses.

Petitioner asserts that when one sifts through the facts and weighs the circumstances to determine whether the state, in the generic sense, has "so far insinuated itself into a position of interdependence (with the Respondent hospital) that it must be recognized as a joint participant in the challenged activity . . .", no question can remain here. c.f. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 725 (1961) cited in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

The Respondent hospital does, indeed, perform a "public" function. The purpose clauses of each of the statutory provisions aforementioned evidence the intent of Congress and the extent Congress has sought to dominate the field of health care. The purpose clauses in all of the above acts evidence the public-private relationship.[8] In each of them, that relationship is boldly "symbiotic"; the aim of Congress being to provide money if the institution fulfills a broad-reaching public role. The aim of Hill-Burton construction money, professional standards review organizations, health systems agencies, statewide health coordinating councils, state health planning and development agencies (all federally created and funded, and designed to review and plan within the hospital environment) and Medicare and Medicaid money (expended through the hospital) is to ensure that there are

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[8]Hill-Burton Act, 42 U.S.C. Section 291 (a); Professional Standards Review Organization Amendments to the Social Security Act, 42 U.S.C. Section 1320c-1; National Health Planning and Resources Development Act of 1974, 42 U.S.C. Section 300k; Medicare, 42 U.S.C. Section 1395; Medicaid, 42 U.S.C. Section 1396.

enough medical facilities and services for everyone.

The government's scheme, simply, relies upon "private" efforts to carry out the administrative tasks, without which construction funds or reimbursements could not serve their purpose. See: *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 717, 723-724 (1961). More importantly, hospitals and health care providers are viewed, through the statutory law, as performing a special public function. C. J. Aniteau, 1 *Modern Constitutional Law,* Section 8:6, at 568.

In *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), on which the Court of Appeals of Indiana herein relied in refusing to find "state action," this Honorable Court declined to find that the function of supplying electricity arose to the level of state action because the service was one the government never obligated itself to supply. 419 U.S. 353.

"Differences in circumstances beget differences in the law." 419 U.S. 358. In health care, the circumstances are, indeed, different, and that difference must be recognized here.

The providing of health care services to all American people is precisely the purpose of those acts which regulate health care. The very purpose clauses thereof announce this. The government, federal and state, supply public medical facilities independent of or complimentary to existing "private" facilities. Unlike the case of public utilites, there exists no independent regulatory agency between the government and the hospital, physician or recipient of services which oversees the implementation of government health policies. Regulatory authority has, in most instances, been "delegated" to hospitals which, thereby, are considered agents of the government. See generally, Note, "Fourteenth Amendment Due Process in Termination of Utility Services for Non-Payment," 86 *Harv. L. Rev.* 1477 (1973). See: *Evans v. Newton,* 382 U.S. 296 (1966).

Government, city, county, state and federal, through the funds which have been given to the Respondent, Fayette Memorial Hospital, use that facility, as they do all hospitals, to carry out a public function, i.e., ensuring that all citizens are provided health care; that there is immediate availability of health care entities with quality assurance.

The importance of careful judicial scrutiny in the health care field is magnified by the fact that decisions often involve life as well as property.[4] "A decision to deny a scarce medical resource calls for procedural safeguards." Note, "Due Procass in the Allocation of Scarce Lifesaving Medical Resources", 84 *Yale L. J.* 1734 (1975)

Many courts and commentators have asserted the presence of "state action" in private hospitals having like facts. C. J. Aniteau, 1 *Modern Constitutional Law* Section 8:50, at 607, T. Emerson, *Political and Civil Rights* 2191, n. 3 (3d ed., 1967). However, many lower courts have, subsequent to the decision in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), weakened those assumptions. The law, nevertheless,

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[4]Many scarce life-saving devices are financed by government. For instance, the hemadialysis (or kidney) machine has been subsidized under the 1972 Amendments to the Social Security Act, 42 U.S.C. Section 426(e)-(g).

remains confused.[5]

Yet, the reasoning in *Jackson* should never preclude a finding of state action in an arguably "private" hospital such as the Respondent. Unlike the public utility in *Jackson*, the Respondent here is funded as well as regulated by government. c.f. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). The public-private relationship is "symbiotic"; the aim of the government programs being to ensure there are enough medical facilities, of proper quality, and which offer services of acceptable costs. The government's scheme

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[5]STATE ACTION FOUND:
Christhilf v. Annapolis Emergency Hospital Association, 496 F. 2d 174 (4th Cir., 1974); *Suffield v. Charleston Area Medical Center*, 503, F. 2d 512 (4th Cir., 1974); *O'Neill v. Grayson County War Memorial Hospital*, 472 F. 2d 1140 (6th Cir., 1973); *Don v. Okmulga Memorial Hospital*, 443 F. 2d 234 (10th Cir., 1972); *Chiaffitelli v. Dettmer Hospital, Inc.*, 437 F. 2d 429 (6th Cir., 1971); *Sams v. Ohio Valley General Hospital Association*, 413 F. 2d 826 (4th Cir., 1969); *Meredith v. Allen County War Memorial Hospital Comm'n.* 397 F. 2d 33 (6th Cir., 1968); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir., 1963), *cert. denied*, 376 U.S. 938 (1964); *Pollock v. Methodist Hospital*, 392 F. Supp. 393 (ED LA., 1975); *Harron v. United Hospital Center, Inc.* 384 F. Supp. 194 (ND W. Va., 1974), *cert. denied*, 424 U.S. 916 (1976); *Citta v. Delaware Valley Hospital*, 318 F. Supp. 301 (ED Pa., 1970); *Cypress v. Newport News Gen. and Non-Sectarian Hospital Ass'n.*, 251 F. Supp. 667 (ED Va., 1966)

STATE ACTION NOT FOUND:
Briscoe v. Bock, 540 F. 2d 392 (8th Cir., 1976); *Greco v. Orange Memorial Hospital Corporation*, 513 F. 2d 873 (5th Cir., 1975), *cert. denied*, 423 U.S. 1000 (1975);*Acherman v. Presbyterian Hospital*, 507 F. 2d 1103 (9th Cir., 1974); *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756 (7th Cir., 1973); *Jackson v. Norton-Children's Hospital, Inc.*, 487 F. 2d 502 (6th Cir., 1973), *cert. denied*, 416 U.S. 1000 (1974); *Ward v. St. Antohny Hospital*, 476 F. 2d 671 (10th Cir., 1973); *Holton v. Crozer-Chester Medical Center*, 419 F. Supp. 334 (ED Pa., 1976), *vacated on other grounds*, 560 F. 2d 575 (3rd Cir., 1977); *Aasum v. Good Samaritan Hospital*, 395 F. Supp. 363 (D. Ore., 1975), *aff'd.* 542 F. 2d 792 (9th Cir., 1976); *Slavcoff v. Harrisburg Polyclinic Hospital*, 375 F. Supp. 999 (MD Pa., 1974), *aff'd mem.*, 511 F. 2d 1391 (3rd Cir., 1975); *Barrett v. United Hospital*, 376 F. Supp. 7791 (SD N.Y., 1974), *aff'd mem.*, 506 F. 2d 1395 (2d Cir., 1975);*Hoberman v. Lock Haven Hospital*, 377 F. Supp. 1178 (MD PA., 1974)

relies on private efforts to carry out administrative tasks, without which all the government funding could not serve its purpose. *Burton v. Wilmington Parking Authority*, 365 U.S. 714, 717, 723-724 (1961).

The relevant consideration, here, given the momentous importance in the application of principles of "due process" embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States, is whether the providing of medical services can be considered a state function *today*. Note, "Due Process in the Allocation of Scarce Lifesaving Medical Resources," 84 *Yale L. J.* 1734, 1738-1739 n. 21 (1975)

The government control over health care is massive. Under today's circumstances, with government so intertwined with private sources in the providing of health care services, the "aggregate of all relevant factors" must compel a finding of state (in the generic sense) responsibility. c.f. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722-726 (1961); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 360 (1974) (Douglas, dissenting.) See generally, *Moose Lodge No.* 107 *v. Irvis*, 407 U.S. 163 (1972)

The instant case is not one which revolves around the question of federal jurisdiction, for the action arose and was ushered through the state courts of Indiana. The instant case raises the very essence of those fears expressed by the authors of the Bill of Rights and the Fourteenth Amendment to the United States Constitution. Elkind, "State Action: Theories For Applying Constitutional Restrictions to Private Activity", 7 *Col. L. Rev.* 656 (1974). Here, there is no question which forum is more desirable.

When the realities of health care, today, are examined, the instant case, if allowed to stand, would serve to defeat constitutional purposes In the modern hospital setting, there is a need to maintain the constitutional integrity of gov-

ernment resources, to protect against misuses by private persons or institutions of power or aid received from government, and to protect against use by government of private individuals to accomplish government objectives without constitutional restraint. Henkind, "Shelly v. Kraemer: Notes for a Revised Opinion", 110 *U. Pa. L. Rev.* 473 (1962); Williams, "The Twilight of State Action," 41 *Texas L. Rev.* 378 (1963). See: *Cooper v. Aaron*, 358 U.S. 1 (1958).

The relationship between the Respondent hospital and government is "symbiotic". The law must reflect that relationship.

II

THE PETITIONER WAS DENIED PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

The petitioner was removed from the Medical Staff of the Respondent hospital. He was removed by the Respondents through the application of an "amendment" to the By-Laws requiring the purchase of medical malpractice insurance. Never was that "amendment" properly or lawfully adopted. The minutes of the Medical Staff reveal that sixteen (16) members of the medical staff were present when the aforementioned "amendment" to the By-Laws was voted upon. Eight (8) voted in favor of the amendment, four (4) voted against it. (Tr. 5-6, 437, and 479). Article XVI of the By-Laws requires a two-thirds vote of the active medical staff members present to enact such an amendment. (Tr. 564 and Note 2, *supra*)

Though the By-Law was never enacted, it was utilized as the vehicle to remove the Petitioner from the medical staff,

and thereby deny him his property.

Never was the Petitioner given adequate notice of his dismissal, for it was delivered to him on the very day he was to be barred from re-entering the hospital. The notifying party was not a committee of the medical staff as is required in the By-Laws (Tr. 540-544 and 550-553), but the Board of Trustees. Accordingly, the Petitioner was denied those rights to a hearing and appeals altogether. Never was the Petitioner given the right to defend his livelihood. Never was he permitted to exercise those procedural rights to a hearing, cross-examination, reasonably impartial judges, and the process of appeals.

Courts have uniformly required not only strict compliance with hospital By-Laws, but "fairness" in any removal of a physician from a medical staff as well. Hammer, "Hospital Medical Staff Privileges: Recent Developments in Procedural Due Process Requirements, "12 *Williamette L. J.* 137, 139 (1975).

Wrote this Honorable Court, "Due process requires a fair hearing before a reasonably impartial tribunal." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). For a physician involved in a situation wherein his privileges have been denied, courts have required notice of the charges levelled to be given sufficiently in advance of the hearing to give the physician an adequate opportunity to prepare a defense. *Silver v. Castle Memorial Hospital*, 53 Hawaii 475, 497 P. 2d 564, *cert den.* 409 U.S. 1048 (1972).

No procedural rights were afforded Petitioner at all.

The By-Law requiring the purchase of medical malpractice insurance, though never lawfully enacted, was, itself suspect. In the absence of any question of competence, such a requirement is arbitrary. See: Muranaka, Compulsory Medi-

cal Malpractice Insurance Statutes: An Approach In Determining Constitutionality, 12 *U. of San Francisco L. Rev.* 599 (Summer, 1978).

The Petitioner was, without cause, and with no rights accorded him to defend himself, thrown out of the Respondent hospital. As a result, his livelihood was destroyed.

Fayette Memorial Hospital, to paraphrase the words of Mr. Justice Marshall, dissenting, in *Jackson v. Metropolitan Elison Co.*, 419 U.S. 345 (1974) is "the only hospital in town". To quote Mr. Justice Douglas, dissenting in the same case, the Respondent hospital is "a monopolist providing essential public services . . . . within a framework of extensive state supervision and control", and, paraphrasing his language in the same dissent, the furnishing of health services and of medical services by the physician of one's choice, "is an entitlement which under our decisions may not be taken without the requirements of procedural due process".

Whatever may be the case with respect to mere private utility companies (see *Jackson*), it is Petitioner's submission that when we deal with the personal and professional relationship of patient and physician, with the requirements for private medical practice, and with the furnishing of medical and hospital care and services to the general public, with matters, indeed, of life or death, it becomes, again in the words of Mr. Justice Marshall, "hard to imagine any INTERESTS — that are furthered by protecting [this hospital] from meeting the Constitutional standards that would apply if [it] were state owned."

In this case, we submit, there does in truth exist between the Respondent hospital and the State that "symbiotic relaship" found to be present in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and which is recognized as a determining factor in the majority opinion in *Jackson*.

CONCLUSION

For the reasons stated hereinabove, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals of Indiana.

Respectfully submitted,

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APPENDIX.

APPENDIX "A"

1977 TERM

FILED FEB. 2, 1977

Sandra W. Richards, Clerk of Union Circuit Court
Liberty, Ind.

CAUSE NO. 8838

WILLIAM RENFORTH - - - - - Plaintiff

Vs:

FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., BOARD OF TRUSTEES OF FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE BOARD OF TRUSTEES OF FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF FAYETTE MEMORIAL HOSPITAL, EARL BRANSON, JOHN J. DARCY, K. DALE FORD, RUSSELL ARCHIBOLD, CHARLES R. BOTTORFF, MARTHA F. KENNEDY, LA VERNE L. MARSH, F. B. MOUNTAIN, J. M. LOCKHART, ALBERT ROBINSON, WILLIS ROSE, HENRY RUHL, KATHLENE SHAVER, DALE SLONEKER, EDWARD THIELKING, WILLIAM THOMAS, R. HIRSCH, R. TAUBE, Z. MUFTI, B. W. SANDERS - - - - - - Defendants

JUDGMENT

BE IT REMEMBERED that on the 19th day of January, 1977 the trial of this cause to the Court, without the intervention of a jury, was concluded, and the Court took the same under advisement.

The Court, having heard and considered all of the evidence in this cause, as well as the law applicable to the issues herein, now finds that judgment should be rendered against plaintiff and for all defendants herein, jointly and severally, on all paragraphs of plaintiff's complaint, numbered I through V, inclusive.

The Court further finds that defendant, Fayette Memorial Hospital Association, Inc., is a private, not for profit In diana Corporation; that defendant hospital's acceptance of Hill-Burton Act funds in the amount of $605,000.00 to assist in paying for a new wing addition to the hospital, costing $1,542,000.00, is not sufficient to invoke "state action", and did not thereby convert defendant hospital into a public or governmental hospital; that defendant hospital's acceptance of funds in 1965 for the new hospital wing from a Fayette County bond issue, and $24,000.00 in 1967 from City of Connersville tax funds did not thereby cause it to abdicate its private status. The fact that defendant hospital accepted the funds above set out did not mean that it was unwillingly surrendering any rights it otherwise possessed to enforce reasonable rules to protect its own solvency, the well-being and solvency of its patients, who might be damaged by a non-insured malpracticing doctor on the hospital staff, and also protect those members of its medical staff who were complying with its reasonable rules and regulations, but could be damaged by a non-complying, malpractice staff doctor. (See Hull vs. North Valley Hospital, 489 Pac. 2nd 136, where defendant hospital was sued for damages by a patient, Hull, who sought

to establish that the hospital was negligent in failing to remove a doctor from its medical staff). Concerning this "private vs. public" hospital issue, the Court finds that no evidence was introduced by plaintiff that any condition relating to the purchase or refusal to purchase malpractice insurance by the medical staff of defendant hospital was imposed on the hospital by the federal government when it accepted Hill-Burton funds nor was any such condition imposed by Fayette County, the City of Connersville, or the State of Indiana, when the hospital received funds from the County and City as set out above. (See Doe vs. Bellin Memorial Hospital, 479 Fed. 2nd 756, 7th Circuit 1973).

The Court further finds that plaintiff's due process rights were not violated by any of the defendants. The privilege to practice one's profession is a liberty protected by the law, but plaintiff was not precluded from exercising that privilege by any by-laws of the hospital medical staff. (See defendants' Exhibit #5 and #29), or any by-laws of the hospital corporation. (See Defendants' Exhibit #30). He need only have complied with the malpractice insurance requirement of the Board of Trustees of the hospital to have continued his membership on the hospital's medical staff. This consideration and finding is sufficient to dispose of plaintiff's possible property interest as well; also, plaintiff testified that he was financially able to purchase the required malpractice insurance, but he was against this requirement as a matter of principle.

The Court further finds that plaintiff and his legal counsel were heard at various hearings held by the Medical Staff. Joint Conference and Professional Committees (See defendants' Exhibit #13), comprised of Board of Trustee and Medical Staf- representatives, concerning his non-compliance with the malpractice insurance requirement. At the Joint Conference and Professional Committee hearing which was attended by plaintiff and his lawyer, plaintiff stated that if he had a

chance to work the hospital's emergency room, he would get the malpractice insurance (See minutes of that Committee's hearing on August 21, 1975, defendant's Exhibit #13). The minutes of the March 8, 1976 meeting of the Executive Committee of the Board of Trustees of the haspital (defendant's Exhibit #20) show that plaintiff was subsequently given emergency room employment and the Executive Committee directed that he be paid for same, although Dr. Taube, a member of the Medical Staff felt plaintiff should not be paid because he still had not purchased malpractice insurance. It should be noted, and the Court now finds, that the hospital's malpractice insurance policy covered plaintiff when he was an employee of the hospital and working in the emergency room.

The Court further finds that plaintiff wrote the Medical Staff By-Laws which were in effect on April 22, 1975, when the Medical Staff held a regular meeting. The official minutes of that meeting (defendant's Exhibit #5) shows that seventeen doctors, including plaintiff, who were then members of the medical staff, were present when the meeting convened, and three doctors were absent. The minutes of that meeting show that a motion was made, seconded and carried by a vote of 8 to 4, "that an addition be made to the Medical Staff By-laws that every staff member must show evidence of a minimum of $100,000.00 medical malpractice insurance when seeking appointment and continued re-appointment to the medical staff of Fayette Memorial Hospital."

Plaintiff now contends that the above cited by-law motion did not carry because the by-laws, which he wrote for the medical staff, provided that a proposed by-law must be passed by a two-thirds favorable vote of the members "present" when the vote was taken. Plaintiff did not object to the minutes of that medical staff meeting, although he was present when the vote was taken. No minutes of any subsequent medical staff meetings held between April 22, 1975 and April 1, 1976

(when plaintiff's staff privileges were revoked by the Board of Trustees of defendant hospital) show that plaintiff ever objected to the above mentioned 8 to 4 vote. The Court now finds that the plaintiff has waived, by his long silence and inaction, any, objection he might have otherwise had to the proceedings of the medical staff meeting on April 22, 1975. **Equity rewards the vigilant, not the indolent.**

The Court further finds that the unchallenged evidence introduced at the trial of this cause revealed that frequently members of the medical staff in attendance at a staff meeting would be called from said meeting for various reasons and would not be present when motions were voted upon. The defendants contend herein that plaintiff has not carried his burden of proof and has not showed that more than 12 members of the medical staff were present when said motion "carried" 8 to 4, as indicated by the official minutes of the April 22, 1975 meeting. The Court now finds that the plaintiff did not carry his burden of proving said motion failed for want of a two-thirds favorable vote of those present when the vote was taken.

The plaintiff herein attaches a great deal of importance to said 8 to 4 vote which he, at this late date, contends was not sufficient to carry the said malpractice insurance motion. The Court now finds that said motion was advisory only and was merely the medical staffs' recommendation to the hospital Board of Trustees that all medical staff members be required to carry malpractice insurance. The medical staff cannot usurp the powers, duties and responsibilities of said Board of Trustees as the same are spelled out in the defendant hospital corporation's Articles, By-Laws and the laws of the State of Indiana, nor can said Board of Trustees abrogate or delegate its powers, duties and responsibilities which have been put squarely upon its shoulders.

Section VII, Paragraph B (3), of he By-laws of said defendant hospital Corporation reads as follows:

> "On all Medical Staff matters the Board of Trustees shall give due consideration to the recommendations of the Medical Staff but shall not be bound by such recommendations if they conflict with the best interests of the hospital and patient."

Section VII, Paragraph B (4) of said By-laws reads as follows:

> "The Board of Trustees, by a majority vote, may exclude any physician, surgeon, or other medical practitioner from the premises of the hospital after deliberation of his case by the Medical Staff and a written recommendation submitted by the Joint Conference and Professional Committee for action." (See defendants' Exhibit #38)

The Court further finds that said Board of Trustees is not in any way bound to accept any recommendation of the Medical Staff or the Joint Conference and Professional Committee. If said Board of Trustees was subservient to the dictates of the Medical Staff and the Joint Conference and Professional Committee, all kinds of chaos could result in the operation and management of defendant hospital.

The Court further finds that all members of the medical staff of defendant hospital were reappointed to the staff by the Board of Trustees for the year 1976, excepting plaintiff. All members of said medical staff purchased malpractice insurance as required by said Board, excepting plaintiff. Plaintiff had a choice, and he was given many months to make that choice by the Board of Trustees, as to whether or not he would purchase $100,000.00 of malpractice insurance. (In Pollock vs. Methodist Hospital 392 F. Supp. 393, the defendant hospital required members of its staff to purchase $100,000.00 of malpractice insurance, and the Federal District Court held

that this requirement was not unreasonable and found for the hospital.) Solely on grounds of principle, plaintiff decided he would not abide by the rules of the game. Whatever may be this principle that plaintiff espouses, it is not concerned with the well-being of his patients, the security of defendant hospital that opened its doors to him and welcomed him as a staff member in 1969, nor is plaintiff's principle concerned with the security and well-being of his insured fellow doctors, who could be joined with the uninsured plaintiff as defendants in a malpractic suit and could be liable for the entire judgment that conceivably could exceed their malpractice insurance coverage. The other members of the medical staff and defendant hospital do not owe plaintiff this sort of generosity.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that plaintiff shall take nothing by his complaint filed herein, consisting of Paragraph I through V, inclusive; that said defendants, jointly and severally, be, and they hereby are, given judgment against said plaintiff for their costs laid out and expended.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED BY THE COURT this 2nd day of February, 1977.

JUDGE OF THE UNION CIRCUIT COURT

cc: Ralph A. Cohen
Loren Marsh
Frank Messer
Ronald E. Williams

APPENDIX "B"

FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

NO. 1-877 A 165

WILLIAM RENFORTH, M.D. Plaintiff-Appellant

Vs:

THE FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., BOARD OF TRUSTEES OF FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE BOARD OF TRUSTEES OF FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF FAYETTE MEMORIAL HOSPITAL, EARL BRANSON, JOHN J. DARCY, K. DALE FORD, RUSSELL ARCHIBOLD, CHARLES R. BOTTORFF, MARTHA F. KENNEDY, LA VERNE L. MARSH, F. B. MOUNTAIN, J. M. LOCKHART, ALBERT ROBINSON, WILLIS ROSE, HENRY RUHL, KATHLENE SHAVER, DALE SLONEKER, EDWARD THIELKING, WILLIAM THOMAS, R. HIRSCH, R. TAUBE, Z. MUFTI, R. W. SANDERS - - - Defendants-Appellees

APPEAL FROM THE UNION CIRCUIT COURT

The Honorable James S. Shepard, Judge

STATEMENT OF THE CASE

Plaintiffs-appellants William Renforth appeals after the

Union Circuit Court entered judgment in favor of defendant-appellee Fayette Memorial Hospital Association (Hospital), *et al.*, in a lawsuit challenging Hospital's by-law which requires all members of Hospital's medical staff to carry professional liability insurance coverage.

FACTS

Dr. Renforth was terminated as a member of Hospital's medical staff on April 1, 1976, because he failed to acquire professional liability insurance coverage, as required by Hospital's by-laws. He filed suit in Fayette Circuit Court against Hospital, its Board of Trustees, the Executive Committee of its Board of Trustees, and the Executive Committee of its medical staff, seeking a restraining order, preliminary and permanent injunctions, and damages. The suit was transferred to Union Circuit Court on change of venue, where the trial court ultimately entered judgment in favor of all defendants.

We affirm.

ISSUES

1. Did the trial court lose jurisdiction when it violated Ind. Rule of Procedure, Trial Rule 79?

2. Is Hospital a public institution, in the sense that its actions constitute state action and are governed by and subject to the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Did Hospital act unlawfully, arbitrarily, and capriciously in imposing the insurance requirement?

Issue One

Dr. Renforth contends that the Union Circuit Court lost jurisdiction of this cause of action when Judge James S. Shepard violated TR 79(1)(b).

Dr. Renforth's lawsuit against Hospital was transferred on change of vanue to the Union Circuit Court on May 12, 1976. On January 1, 1977, TR 79 became effective to provide as follows:

> "(1) Whenever the regular judge or presiding judge of any court or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person
>
> • • •
>
> (b) Is acting as a lawyer in the proceeding, . . .
>
> • • •
>
> The venue of which is before such judge, he shall disqualify himself immediately and cause such fact to be certified to the Supreme Court which shall thereupon appoint a special judge."
>
> • • •

The cause came on for trial, without intervention of a jury, on January 18, 1977. The trial court rendered judgment in favor of all defendants on February 2, 1977. Dr. Renforth filed his motion to correct errors on March 31, 1977, which the trial court overruled on May 19, 1977.

On May 20, 1977, Dr. Renforth filed his motion for change of judge, based upon TR 79(1) (b). The judge of the Union Circuit Court is the father-in-law of one of the attorneys who represented Hospital in the trial court proceeding. The trial court did not rule on the motion. Dr. Renforth instituted an original action in the Supreme Court on May 31, 1977, claiming that the trial court had no jurisdiction in the cause of action because of the violation of TR 79. The Supreme Court held that Dr. Renforth should have brought his jurisdictional claim to that court prior to final judgment. Justice DeBruler wrote, at 369 N.E. 2d 1078: "As relator did not avail himself of this opportunity, his remedy is by way of appeal."

Dr. Renforth, accordingly, presented the following issue on appeal: Is TR 79(1) (b) mandatory and will violation thereof divest the trial court of jurisdiction?

If a court has jurisdiction of the class of actions to which a particular case belongs, the court has jurisdiction of the subject matter of the action. When a court does not have subject matter jurisdiction, the parties cannot confer such jurisdiction by consent. *Farley v. Farley* (1973), 157 Ind. App. 385, 300 N.E. 2d 375.

If a court does have jurisdiction of the subject matter of the action, the parties may give consent, express or implied, to jurisdiction of the particular case. *Farley v. Farley, supra.*

Dr. Renforth does not challenge the jurisdiction of the Union Circuit Court to entertain the class of actions to which his particular case belongs. He contends that the Union Circuit Court, by violating TR 79(1) (b), lost jurisdiction of his particular case.

An affidavit signed by the attorney who represented Dr. Renforth in the trial court proceeding reveals that Dr. Renforth's attorney became aware of the relationship existing between the judge and one of Hospital's attorneys in August or September 1976. The effective date of TR 79 was January 1, 1977, yet Dr. Renforth made no effort to challenge the jurisdiction of the trial court until more than three months after the trial court entered judgment adverse to him on February 2, 1977. Certainly these facts warrant a holding that Dr. Renforth gave implied consent to jurisdiction of his particular case, unless the wording of TR 79 dictates a contrary conclusion.

TR 79 does provide that the trial court judge *shall* disqualify himself when he is closely related to one of the attorneys participating in the action. Obviously, Judge Shepard

was in a far better position to know of the relationship than was Dr. Renforth. We cannot ignore the fact, however, that Dr. Renforth's attorney did in fact know of the relationship and did permit the matter to go to trial without objection.

A complete reading of TR 79 reveals that its primary purpose is to set forth a procedure for selecting special judges rather than to define who shall and who shall not be eligible to sit as judge in a particular case. The rule should be enforced in a manner that does not emasculate the unambiguous wording contained therein, but it should also be enforced in a manner which prevents a party with knowledge of the relationship from remaining silent until he suffers an adverse judgment.

With these considerations in mind, along with due regard for the rule that consent to jurisdiction of a particular case can be given impliedly, we deem it to be appropriate to enforce TR 79 (1) (b) as follows: A judge has a duty to disqualify himself when he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person is acting as a lawyer in the proceeding. Failure of the judge to disqualify himself will not result in loss of jurisdiction, however, if the party who raises the issue on appeal knew, or had reason to know, of the relationship prior to the time final judgment was entered.[1]

We hold that Dr. Renforth impliedly consented to the jurisdiction of the Union Circuit Court.

Issue Two

Fayette Memorial Hospital is organized as a private, not-for-profit hospital. Dr. Renforth contends that Hospital, for

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[1]If, for example, the judge and one of the attorneys shared the same name, that fact would be sufficient cause for a person to make inquiry; failure to make inquiry would amount to waiver of the issue.

a number of reasons, has become a public institution in the sense that its actions constitute state action and are governed by and subject to the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Due Process Clause of the Fourteenth Amendment provides: [N] or shall any State deprive any person of life, liberty, or property, without due process of law; . . ." The Due Process Clause applies to state action, but it offers no shield against private conduct regardless of how wrongful such private conduct may be. *Jackson v. Metropolitan Edison Co.* (1974), 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed. 2d 477; *Shelley v. Kraemer* (1948), 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. As the Supreme Court noted in *Jackson v. Metropolitan Edison Co., supra,* at 95 S.Ct. 449, 453:

> ". . . While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer. . . ."

Dr. Renforth first argues that Hospital's action is state action because Hospital has accepted governmental funds and thereby subjected itself to government regulation.

The impetus for the challenged activity need not originate with the state. State action may be found if the state simply enforces the activity which originates privately. *Moose Lodge No. 107 v. Irvis* (1972), 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed. 2d 627. However, a nexus must exist between the governmental involvement and the particular activity being challenged. *Doe v. Bellin Memorial Hospital* (7th Cir. 1973), 479

F. 2d 756..[2] Or the evidence must show that the state "has so far insinuated itself into a position of interdependence" with the private institution that the state has become "a joint participant" in the challenged activity. *Burton v. Wilmington Parking Authority* (1961), 365 U.S. 715, 81 S.Ct. 856, 862, 6 L.Ed. 2d 45.

In *Doe v. Bellin Memorial Hospital, supra,* Jane Doe and her physician brought an action seeking an injunction to prevent a hospital and its officials from denying use of the facilities for an abortion. She argued that the hospital acted "under color of" state law within the meaning of the civil rights statutes because it accepted financial support provided through state and federal programs and thereby subjected itself to detailed regulation.

The Honorable John Paul Stevens, who was then Judge for the Seventh Circuit Court of Appeals, penned the opinion in the case. First he noted that no nexus existed between receipt of governmental funding and the hospital's rule prohibiting the performance of abortions:

> "* * *
>
> No doubt the the defendant hospital agreed to abide by a variety of regulatory terms related both to its operations and to the use of the Hill-Burton funds in connection with its acceptance of benefits under that Act. There is no evidence, however, that any condition

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[2]In Jackson v. Metropolitan Edison Co. (1974), 419 U.S. 345, 95 S.Ct. 449, 457, 42 L.Ed. 2d 477, petitioner alleged that she had been denied due process of law when the respondent, a privately owned utility company, terminated the electrical service to her home for nonpayment of bills without giving her prior notice of its proposed action. The Supreme Court held:

> ". . . the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment. . . ."

related to the performance or non-performance of abortions was imposed upon the hospital. Unlike the fact situation in Simkins v. Moves H. Cone Memorial Hospital, 323 F. 2d 959 (4th Cir. 1963), on which plaintiffs place heavy reliance, *this record does not reflect any governmental involvement in the very activity which is being challenged.* We find no basis for concluding that by accepting Hill-Burton funds the hospital unwittingly surrendered the right it otherwise possessed to determine whether it would accept abortion patients.
(Our emphasis)

* * *"

(Footnote omitted)

Next he emphasized that the state had received no benefit as a result of the hospital's policy opposing abortions:

"* * *

Nor do we believe that the implementation of defendant's own rules relating to abortions is action 'under color of' state law within the meaning of § 1983. The State of Wisconsin is not a beneficiary of those rules and cannot be characterized as a 'joint participant' in their adoption or enforcement. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-725, 81 S.Ct. 856, 6 L.Ed. 2d 45. . . ."

Judge Stevens then summarized the reasoning of the court:

". . . There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits. Insofar as action of the State of Wisconsin or its agents is disclosed by the record, the State has exercised no influence whatsoever on the decision of the defendants which plaintiffs challenge in this litigation.

The facts that defendants have accepted financial support, as alleged, from both the federal and state governments, and that the hospital is subject to detailed

regulation by the State, do not jusify the conclusion that its conduct, which is unaffected by such support of such regulation, is governed by § 1983.[3] . . ."

Dr. Renforth has painstakingly set forth summaries of the governmental programs in which Hospital participated. Dr. Renforth has totally failed, however, to show any nexus between the governmental funds and programs, and the position taken by Hospital regarding professional liability insurance. Hospital's administrator specifically testified that no governmental entity influenced Hospital's decision to require insurance coverage for the members of its medical staff. Furthermore, the evidence reveals no interdependence between Hospital and the governmental bodies, as proved to be decisive in the case of *Burton v. Wilmington Park Authority, supra.*

Dr. Renforth contends that the composition of Hospital's Board of Trustees converts the private hospital into a public institution.

Paragraph (6) 6 (f) of the Articles of Reorganization of Fayette Memorial Hospital Association provides:

"The Board of Trustees shall consist of seventeen (17) members. One (1) member shall be elected by the County Council of Fayette County; and one (1) member shall be elected by the Board of Commissions (sic) of Fayette County; one (1) member shall be elected by the Common Council of the City of Connersville, Indiana; two (2) members shall be medical doctors elected by the active medical staff of the Fayette Memorial Hospital; and twelve members shall be elected by the Council of the Association. . . ."

Hospital emphasizes that the first three members referred

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[3]All quotations from Doe v. Bellin Memorial Hospital, supra, appear at 479 F. 2d 761.

to in the paragraph set forth above are required to be elected *by*, not necessarily *from*, the governmental bodies. The trial court heard testimony that the three members elected by the County Council, the Board of Commissioners, and the Common Council acted independently and did not report to the governmental bodies which elected them.

Dr. Renforth has failed to prove state action based upon the composition of Hospital's seventeen-member Board of Trustees.

Dr. Renforth also argues that state action must be found because Hospital enjoys a monopoly position while performing a public function.

In *Barrett v. United Hospital* (S.D.N.Y. 1974)), 376 F. Supp. 791, 799, *aff'd*, (2d Cir. 1974), 506 F. 2d 1395, the court acknowledged that the acts of a private institution may be denominated state action when a private institution performs, pursuant to a right accorded by statute, a function performed traditionally by the state. Judge Bauman concluded, however, that private hospitals do not perform a function traditionally performed by the government:

> ". . . Unlike fire departments and police departments mentioned by Justice Douglas in Evans v. Newton, supra [(1966), 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed. 2d 373] at 302, hospitals are not traditionally governmental. Private hospitals are the rule rather than the exception. It is only relatively recently that federal, state and local governments have recognized the need for widespread public health care. Traditionally, however, the provision of medical services has been a matter largely in the private domain. . . ." (Our insertion)

The court then considered the particular argument comparable to the one which Dr. Renforth presents in the case at bar:

"* * *

> Plaintiff . . . [stresses] that United Hospital is the *only* general hospital serving the area. As such, he argues, it operates in a quasi-public capacity, . . . Even assuming this to be so, I cannot conclude that it makes the 'public function' theory applicable to the case at bar. That doctrine has heretofore been limited in its application to situations where the constitutional violation alleged occurred *in the very activity in which the private institution performed its 'traditionally governmental function'*.
>
> This is not the case here. Even if it may be successfully argued that a private hospital is performing a public function it is clear that the function involved is the admission and treatment of patients, not the hiring and firing of doctors, nurses and other staff personnel. I find no compelling authority for extending the 'public function' argument to a private hospital in the absence of a nexus between the governmental function performed and the violative activity alleged." (Original emphasis) (Footnotes omitted) (Our insertion)

We do not rely solely upon *Barrett v. United Hospital, supra*, in resolving this issue.. The United States Supreme Court, in *Jackson v. Metropolitan Edison Co., supra*, held that there must be evidence of a relationship between the challenged action and the monopoly status before State action will be found.

Dr. Renforth has not shown a nexus between any purported governmental function performed by Hospital and the insurance requirement which he challenges. His argument must fail.

Dr. Renforth refers to tax funds, bond proceeds, and Medicare and Medicaid payments which were paid to or otherwise benefitted Hospital. In each instance, however, Dr. Renforth has shown no nexus between those benefits and the insurance requirement.

Dr. Renforth and Hospital have cited a multitude of cases in support of their arguments. Having carefully considered the arguments presented, the authorities cited, and the evidence adduced during trial and by subsequent affidavits, we must hold that Dr. Renforth failed to present evidence proving that state action was involved in Hospital's decision and action to require members of its medical staff to carry professional liability insurance.[4]

Issue Three

Dr. Renforth contends that Hospital acted in an unlawful, arbitrary, and capricious manner when it imposed the insurance requirement.

In *Holmes v. Hoemako Hospital* (1977), 117 Ariz. 403, 573 P. 2d 477, Dr. Holmes, the only doctor in Elroy, Arizona, brought suit against the only hospital serving the community and sought to have the hospital enjoined from enforcing against him its requirement that each member of its medical staff must show proof of professional liability insurance. After recognizing the right of the Arizona courts to engage in a narrow review of the procedural and substantive issues involved in the activities of the private, nonprofit hospital, the Arizona Supreme Court explained its test for determining whether the hospital's rule was reasonable or arbitrary: "did it pertain to the 'orderly management of the hospital and in most instances . . . [was it] . . . made for the protection of patients'?"[5] That court held that the hospital's requirement was not, *per se*, unlawful, arbitrary, or capricious:

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[4]In his brief Dr. Renforth attempts to provide evidence of a nexus. We remind Dr. Renforth that he must try his case and make his record in the trial court. The Court of Appeals is a court of review.

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[5]573 P. 2d 477, 479.

> "We cannot ignore the realities of modern procedural practice. If a patient is injured while in a hospital, regardless of who is at fault, the hospital will almost always be joined as a codefendant. Despite the outcome of such an action, the hospital must expend valuable financial resources in its own defense, and will, if innocent of wrong-doing, be more likely to recover its expenses from the tort-feasor physician if that physician is insured. If, indeed, some conscientious lawyer decides not to include the hospital in an action where the finger of negligence points directly and solely to the doctor, we can be certain it will be only because the physician does indeed have malpractice insurance.
>
> Nor can we ignore the realities of the situation where the doctor and hospital are found to be joint tort-feasors. We agree that there is no right to contribution between or among joint tort-feasors in Arizona. *Blakely Oil v. Crowder*, 80 Ariz. 72, 292 P. 2d 842 (1956); *Chrysler Corp. v. McCarthy*, 14 Ariz. App. 536, 484 P. 2d 1065 (1971). Practically speaking, however, it is not an uncommon solution to such joint liability for the insurers of both or all joint tort-feasors to contribute, in settlement or after verdict, to the fund which compensates the victim.
>
> The hospital has the right to take reasonable measures to protect itself and the patients it serves. We cannot say, as a matter of law, that the hospital board's attention to its medical staff's malpractice insurance is unlawful, arbitrary or capricious. As a practical matter, we cannot say it is irrational or unreasonable. . . ."[6]

The Arizona court recognized, however, that such a requirement might be proved unreasonable in a particular case:

> "* * *
>
> This is not to say that in this matter an exception to the requirement might not be in order. We are well

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[6]573 P. 2d 477, 479.

aware of the fact that the right to follow any lawful vocation or profession is constitutionally protected. *City of Tucson v. Stewart,* 45 Ariz. 36, 40 P. 2d 72 (1935); *Meyer v. State of Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). We believe there is a con-comitant right of individuals to a choice of physicians. *See Findlay, supra.* We also realize that in this particular situation the people of Elroy have only one choice of physicians: Dr. Holmes. Unless and until, however, Dr. Holmes provides the hospital and its Board with evidence of good reason why he should not be required to carry professional liability insurance, the courts of this state cannot help him or his patients. He failed, on appeal, to present any facts that show he is unable to afford the insurance or that insurance is unavailable to him. He is, therefore, apparently being prevented from exercising staff privileges by his own choice.'

* * *"

In the case at bar the trial court heard evidence concerning the reasons Hospital adopted the by-law requiring physicians to obtain professional liability insurance: (1) if both Hospital and a physician were named defendants in a lawsuit, Hosptal desired assurance that the physician could contribute toward costs of defending against such an action; (2) Hospital felt it was showing due regard for the patients it serves by requiring insurance coverage for the doctors who might become liable to the patients; (3) by imposing the requirement on the physicians who used Hospital's facilities, Hospital was in a better position to assure insurance coverage for itself, and at a lower premium; and (4) Hospital feared that it might suffer the financial burden for negligence committed in its emergency room by a member of the medical staff if that physician had no insurance.

Dr. Renforth testified that he objected to the insurance

'573 P. 2d 477, 479-80.

requirement solely as a matter of principle. He did not suggest that he could not obtain insurance or that he could not afford to pay the premiums for the insurance.

Although Dr. Renforth presents forceful argument and cites authority in support thereof, we are persuaded to follow the reasoning of the Arizona Supreme Court. Accordingly, we hold that the requirement is substantively valid. Dr. Renforth raises two final procedural issues, however.

Dr. Renforth contends that the amendment to the by-laws was not duly adopted.

Article XVI of the by-laws describes the procedure for amendment: (1) the proposed amendment is submitted at a meeting of the medical staff; (2) the medical staff refers the proposed amendment to a special committee; (3) the special committee reports at the next meeting of the medical staff; (4) adoption requires a two-thirds vote of the active medical staff present; and (5) amendments are effective when approved by the Board of Trustees.

The minutes of the meeting held February 18, 1975, by the medical staff show that the medical staff considered a letter received from the Indiana State Medical Association and the Indiana Hospital Association "urging that our by-laws be changed" to require evidence of medical malpractice insurance before appointment or reappointment to the staff. The medical staff referred the letters to the by-laws committee. The by-laws committee reported back to the medical staff with a recommendation that each physician be left to make his own decision as to whether or not he would acquire insurance.

The minutes of the meeting held by the medical staff on April 22, 1975, include the following entry:

"A motion was made by Dr. Mazdai and seconded by

Dr. Rosen that an addition be made to the medical staff by-laws that every staff member must show evidence of a minimum of $100,000 medical malpractice insurance when seeking appointment and continued reappointment to the medical staff of Fayette Memorial Hospital.

MOTION CARRIED, 8 in favor, 4 against. This will be added to the by-laws."

Mr. Bottorff testified that on May 27, 1975, the Board of Trustees affirmed the Executive Committee's approval of the amendment to the bylaws.

The prescribed procedure does not demand a favorable report from the special committee. We find sufficient compliance with Article XVI.

Dr. Renforth insists that the amendment did not receive adequate votes at the meeting of the medical staff. The minuees show that the motion carried, "8 in favor, 4 against." The minutes also list sixteen voting members as present at the meeting. The bylaws require that proposed amendments must receive a two-thirds vote of the members present.

Mrs. Weisheit, who recorded all of the minutes of the meetings, testified that she always listed as present all those persons who were present at some time during the meeting, regardless of their time of arrival, time of departure, and duration of stay. She stated that doctors were frequently called from the meetings; some did return and some did not return. Other doctors arrived late for meetings. She could not recall whether anyone abstained from voting at the time of the vote on the insurance amendment. Other persons testified similarly concerning the doctors' arriving and departing as meetings progressed.

Dr. Renforth testified that some doctors did abstain from voting and that he did realize immediately that the number of votes was not sufficient for amending the bylaws. The

trial court also heard evidence, however, that Dr. Renforth made absolutely no protest when it was announced that the amendment had been adopted. The minutes of the next meeting of the medical staff show that Dr. Renforth was present and the minutes of the prior meeting were approved as read.

This court must look to the evidence which supports the judgment of the trial court. We cannot say, as a matter of law, that the trial court erred when it found that the amendment was duly adopted by the medical staff.

Lastly, Dr. Renforth contends that he was not provided hearings, as required by the bylaws.

The record reveals that Dr. Renforth was granted hearings and opportunities to make his position known. Furthermore, Article VIII of the bylaws provides that failure to request a hearing shall be deemed waiver of any right to a hearing. Dr. Renforth has not directed our attention to any evidence that he ever requested any hearing which was not provided. Although Dr. Renforth alleges that his termination was not accomplished with precise compliance with prescribed procedure, that is an issue which Dr. Renforth should have raised by seeking a hearing when he received his notice of termination.

Because Dr. Renforth has failed to show that the trial court committed reversible error, we affirm the judgment entered by the Union Circuit Court.

LYBROOK, P. J. and ROBERTSON, J. CONCUR.

APPENDIX "C"

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
STATE OF INDIANA

No. 1-877A165

WILLIAM RENFORTH, M.D.

V.

FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC.

You are hereby notified that the Court of Appeal has on this lay DENIED Appellant's Application for Rehearing and Motion for Oral Argument. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 16th day of January, 1979.

MAJORIE H. O'LAUGHLIN
Clerk Supreme Court and
Court of Appeals

APPENDIX "D"

IN THE

SUPREME COURT OF INDIANA

CAUSE NO. 1-877 A 165

WILLIAM RENFORTH, M.D. **Plaintiff-Appellant**

Vs:

FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., et. al. **Defendants-Appellees**

ORDER

DENYING PETITION TO TRANSFER

"Appellant's Petition to Transfer to the Supreme Court of Indiana" is hereby DENIED this 6th day of June, 1979.

RICHARD M. GIVAN

Chief Justice of Indiana

ALL JUSTICES CONCUR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-344

WILLIAM RENFORTH, M.D. .... Petitioner

-v-

FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., BOARD OF TRUSTEES FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE BOARD OF TRUSTEES OF FAYETTE MEMORIAL HOSPITAL ASSOCIATION, INC., EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF FAYETTE MEMORIAL HOSPITAL, EARL BRANSON, JOHN D. DARCY, K. DALE FORD, RUSSELL ARCHIBOLD, CHARLES R. BOTTORFF, MARTHA F. KENNEDY, LA VERNE L. MARSH, F. B. MOUNTAIN, J. M. LOCKHART, ALBERT ROBINSON, WILLIS ROSE, HENRY RUHL, KATHLENE SHAVER, DALE SLONEKER, EDWARD THIELKING, WILLIAM THOMAS, R. HIRSCH, R. TAUBE, Z. MUFTI, B. W. SANDERS ..... Respondents

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BRIEF IN OPPOSITION

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Attorney for Respondent

INDEX

Questions Presented:

1. Petitioner's questions 1 and 2, which are essentially the same, are irrelevant to the disposition of this case.

2. Petitioner's question 3 fails to indicate any connection between the actions of the State and the actions of the hospital.

3. Respondent does not feel that question 4 should properly be reached on the merits by the Court.

4. The "fact" assumed by question 5 was never demonstrated or determined below, but even if it had, Petitioner has never shown any connection between actions of the State and the actions of the hospital.

Statement Of Case:

The facts stated by Petitioner as "The Factual Background" (Petition, pp. 10-18) are seriously misleading. As presented by Petitioner they attempt to establish a factual basis for Petitioner's arguments that he was denied basic due process and that government intervention in hospital operations converts the hospital's actions into state action. It is necessary for Respondent to restate the facts on each issue because Petitioner's presentation of "The Factual Background" is so distorted it cannot form the basis for a fair determination in this Court. The facts as to each issue are discussed separately. Citations to "R" are to the transcript of the record below.

I. Process Accorded Dr. Renforth

Petitioner attempts to create the impression that Dr. Renforth was virtually "railroaded" off the staff. For example, Petitioner states, "The Petitioner was never given an opportunity to defend himself. No medical staff committee ever heard his plea, as they

were required to do under the By-Laws." (Petition, p. 12)

The fact of the matter, however, is that Dr. Renforth had several opportunities to be heard, including an appearance before the Joint Conference and Professional Committee, a committee composed of representatives of the Board and the Medical Staff which considers matters of common interest to both groups. It was expressly convened on August 21, 1975 "to consider the case of Dr. Renforth and his requirement to furnish malpractice insurance." (R, pp. 411, 445) At that meeting Dr. Renforth appeared with his attorney, Loren Marsh. They were afforded an opportunity to state their position on this issue. Mr. Marsh's acknowledged role at this meeting as counsel for Petitioner was to try to convince the committee to advise the board not to enforce the by-law, and Dr. Renforth was encouraged to explain his position. (R, pp. 380-85.)

Petitioner's other assertions as to the lack of process accorded him are just as misleading. They

consist of his own contentions as to various facts, many of which were disputed and were not accepted by the trial court or the Indiana Court of Appeals. A brief summary of these undisputed facts or, where disputed, the findings by the trial court and the Court of Appeals of Indiana follows.

Dr. Renforth himself wrote the by-laws containing the voting requirements which he claims were violated. (Petitioner's Appendix A, p. 4-A) Dr. Renforth was present and voting at the Medical Staff meeting which adopted the recommendation of the Indiana Hospital Association that staff physicians be required to show proof of insurance coverage for medical malpractice. (Petitioner's Appendix A, p. 4-A) The minutes of the meeting show the motion carried 8 votes in favor, 4 against with no recorded abstentions or members not voting. Dr. Renforth did not object to the vote at that time nor until he filed his suit over a year later did he ever contend that the vote adopting the amendment was improper. He never offered evidence at trial that sustained his argument that less than two-thirds of the staff present had not

approved the amendment. To the contrary it was established that while more than 12 members were shown on the minutes as "present" this meant only that they were present at some time during the meeting, not at the time the vote was taken. (Petitioner's Appendix A, pp. 4-A, 5-A.) The Board of Trustees of Fayette Memorial Hospital adopted the recommendation of the Medical Staff which it had the power to do in its own discretion. (Petitioner's Appendix A, p. 6-A)

Dr. Renforth submitted his application for reappointment for 1976 without evidence of malpractice coverage and with a certification that he had read the hospital's by-laws and would be bound by them. (R, p. 254-55.) He was fully aware of the review process for his application and even sat on one of the committees which reviewed it. (R, pp. 501-03.) He was formally notified of the recommendation pending against him in letters from the Executive Committee in February 1976 and appeared himself before that Committee on February 17, 1976 at which time he argued his position again. (R, p. 511.) When

the Board finally voted to renew staff privileges for all other physicians except Dr. Renforth on March 30, 1976, Petitioner had had almost a full year to argue his position, to purchase medical malpractice insurance or to apply for staff privileges at another hospital. To this day he is free to seek reappointment to the staff of Fayette Memorial Hospital if he submits proof of insurance coverage for medical malpractice, or to any hospital in the state which does not require malpractice insurance. To say that, "the Respondent hospital simply decided to rid itself of the Petitioner and be done with it," (Pet. p. 12) is unjustified and misleading.

II. Hospital Finance and Governance

Contrary to Petitioner's allegations, there is no "vast interdependence" of Fayette Memorial Hospital and State and Federal Government, (Pet. p. 13) nor does any government dictate the internal organization of the hospital's administration or staff. (Pet. p. 18) The members of the hospital's board of trustees who are elected by local government bodies from the general public exercise their own judgment and do not

report back to or represent those government bodies. The figures on public funding cited by Petitioner (Pet. p. 13) must be placed in perspective. The aid from the Hill-Burton program amounted to 39% of construction funds in 1965. City and County contributions in 1967 amounted to a trifling percentage of operating expenses and had no effect on the policy complained of. These contributions occurred ten years before adoption of the by-law requiring malpractice insurance. The percentages testify to the fact that the hospital is not a shell through which the government operates.

The assertion by Petitioner that government regulation, admittedly complex and extensive, caused or indeed had anything whatsoever to do with the hospital's adoption of the malpractice insurance requirement is without a shred of evidence to support it. Respondent has consistently shown that its policy change was initiated by a joint recommendation from the Indiana State Medical Association and the Indiana Hospital Association and that it was motivated by sound, prudent, and fair considerations which were not

based in any way on government regulations. (Petitioner's Appendix A, pp. 2-A and 6-A.) It was undisputed, as a factual matter, that there is no connection whatever, of any kind, between the government regulations and contributions and the hospital by-law of which Dr. Renforth complains.

Reasons For Denying Writ: This is an inappropriate case for certiorari because:

1. No factual evidence has been advanced and sustained anywhere on the record to support Petitioner's assertion of a connection between the various government regulations on the one hand and the hospital's policy requiring medical malpractice insurance on the other.

The record below is heavily devoted to evidence on such factual issues as how many doctors were present at the time the vote was taken adopting the amendment to the by-laws and whether Petitioner's own acts constituted a failure to avail himself of further administrative hearings. There was no development of evidence or legal argument in the

record below as to what kind or amount of connection may be required between government funding and regulations imposed upon the health care provider and the malpractice insurance policies of that provider.

Instead, the Petitioner asserts that the regulations and funding of Medicare, Medicaid, Hill-Burton and other government programs render "action by that hospital corporation action by the state." (Pet. p. 13) The assertion is unqualified, and its implications would be boundless. The issue was not argued extensively; the case was decided by an intermediate state court of appeal rather than after full argument before the highest court of the state, and the record provides nothing on which this Court might analyze this question. Even an affirmance of the decision below would give little guidance in the area.

2. The question of state action or no state action in the hospital's acceptance of public funds is irrelevant to the determination of this dispute.

Even if this Court wished to adopt the position of the Fourth Circuit that receipt of governmental funds results, per se, in state action on the part of the

recipient as to the activity complained of, both the substantive policy of the hospital in requiring medical malpractice insurance and the procedure it used in examining Dr. Renforth's application lacking proof of the insurance were fair and reasonable by any standard. The issue of what constitutes state action in the health care context and what nexus if any must be shown should await a case in which the decision would make a difference to the outcome of the case.

3. The hospital's policy of requiring medical malpractice insurance does not violate substantive due process requirements whether the hospital board is judged as an arm of the state or as a purely private institution and there is no conflict in the decisions on this specific issue.

There are only three cases in which courts have reviewed a hospital's decision to require its physicians to carry malpractice insurance. In Pollock v. Methodist Hospital, 392 F.Supp. 393, (E.D. La. 1975) the trial court held the private hospital to the state action standard and went on to hold that the requirement of malpractice coverage was prudent,

reasonable, and fully in accord with the standards of due process. In the most recent case other than the present one, Holmes v. Hoemako Hospital, 573 P.2d 477 (Ariz. 1978), the court analyzed at great length the rationale for a hospital requiring medical malpractice insurance of staff physicians and upheld the denial of privileges to a doctor who refused to purchase any. Rosner v. Peninsula Hospital District, 224 Cal.App.2d 115, 36 Cal. Rptr. 332 (1964), not cited by Petitioner to support his case, is contra but was decided under a California statute governing only public hospitals. On this issue of the validity of requiring malpractice insurance there is no conflict in holding that such a requirement is neither arbitrary, caprious, or unreasonable.

4. Petitioner was clearly afforded numerous hearings with and without his counsel present and was unrestrained in his right to present and argue his position fully satisfying the requirements of procedural due process.

Following his submission of an application for reappointment which lacked evidence of malpractice

insurance coverage, Petitioner was afforded several hearings which approached the "mini-trial" level of procedure even though the only issue to be determined was the simple factual question of whether or not he had presented evidence of malpractice insurance coverage. These are summarized at pages 1-3 of this Brief and need not be repeated here. Despite his assertions otherwise, the resolution of Petitioner's case does not turn on legal questions of standards of procedural due process.

5. The decisions of the lower court follow squarely and exactly the precedents of this Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) and the Seventh Circuit in Doe v. Bellin Mem. Hosp., 479 F.2d 756 (7th Cir. 1973) authored by the then Circuit Judge John Paul Stevens. Even though there may be a conflict on the limited issue of whether receipt of public funds renders an otherwise private hospital a public entity for state action purposes between this case and those of the Fourth Circuit, this case does not afford a suitable vehicle for resolving that conflict. Substantive and procedural due process were

accorded here, and Petitioner failed to develop a factual basis on which to analyze and decide the question of what nexus if any should be required between requiring malpractice insurance and the governmental funds and regulations claimed to constitute the grounds for finding state action.

Conclusion

For the reasons stated hereinabove, a Writ of Certiorari should not issue to review the judgment and opinion of the Court of Appeals of Indiana.

Respectfully submitted,

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